



# Public Service Commission

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COMMISSION CLERK

DATE: JANUARY 10, 2002

TO: DIRECTOR, DIVISION OF COMMISSION CLERK AND ADMINISTRATIVE SERVICES (BAYÓ)

FROM: DIVISION OF ECONOMIC REGULATION (RIEGER, MAILHOT)<sup>SDR</sup>  
OFFICE OF GENERAL COUNSEL (CROSBY, GERVASI)<sup>DM</sup> *ps* *max* *1/28*

RE: DOCKET NO. 011344-WS - RESOLUTION No. 2001-128 BY NASSAU COUNTY, IN ACCORDANCE WITH SECTION 367.171, F.S., RESCINDING FLORIDA PUBLIC SERVICE COMMISSION JURISDICTION OVER INVESTOR-OWNED WATER AND WASTEWATER SYSTEMS IN NASSAU COUNTY.

AGENDA: 01/22/02 - REGULAR AGENDA - PROPOSED AGENCY ACTION FOR ISSUES 2 AND 3 - INTERESTED PERSONS MAY PARTICIPATE

CRITICAL DATES: NONE

SPECIAL INSTRUCTIONS: NONE

FILE NAME AND LOCATION: S:\PSC\RGO\WP\011344.RCM

### CASE BACKGROUND

On November 17, 1964, the Board of County Commissioners of Nassau County (County Board) adopted a resolution declaring Nassau County (County) subject to the provisions of Chapter 367, Florida Statutes. This resolution invoked Commission jurisdiction over investor-owned water and wastewater utilities in the County. The Commission acknowledged the resolution by Order No. 3733, issued January 6, 1965, in Docket No. 5818-WS.

On September 17, 2001, the County Board adopted Resolution No. 2001-128, rescinding the Commission's jurisdiction over investor-owned water and wastewater utilities in the County effective immediately. This recommendation addresses the County resolution.

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FPSC-COMMISSION CLERK

A recommendation was originally filed in this docket on December 21, 2001. Since the filing of the original recommendation, staff has learned that United Water Florida Inc. (UWF), a utility at issue in this recommendation, has been sold to JEA, a governmental authority exempt from Commission regulation pursuant to Section 367.022(2), Florida Statutes. The original recommendation was deferred one agenda in order to address the ramifications of the sale in Issue 2.

The Commission has jurisdiction pursuant to Section 367.171, Florida Statutes.

#### DISCUSSION OF ISSUES

**ISSUE 1:** Should the Commission acknowledge Resolution No. 2001-128, rescinding the Commission's jurisdiction over investor-owned water and wastewater utilities in Nassau County effective September 17, 2001?

**RECOMMENDATION:** Yes. The Commission should acknowledge Resolution No. 2001-128, rescinding the Commission's jurisdiction over investor-owned water and wastewater utilities in Nassau County, effective September 17, 2001. Certificate No. 001-W, held by Florida Public Utilities Company (Fernandina Beach System) (FPUC), should be canceled and returned to the Commission within 30 days from when FPUC is no longer a party to, or at the conclusion of, Docket No. 990817-WS. The cancellation of the certificate does not affect the authority of the Commission to collect, or the obligation of FPUC to pay, regulatory assessment fees accrued prior to the September 17, 2001, transfer of jurisdiction to the County. (RIEGER, CROSBY)

**STAFF ANALYSIS:** As stated in the case background, on November 17, 1964, the County Board adopted a resolution declaring the County subject to the provisions of Chapter 367, Florida Statutes. This resolution invoked Commission jurisdiction over investor-owned water and wastewater utilities in the County. On September 17, 2001, in accordance with Section 367.171(1), Florida Statutes, the County Board adopted Resolution No. 2001-128 rescinding Commission jurisdiction in the County effective immediately.

Section 367.171(1), Florida Statutes, provides that a county, after ten continuous years under Commission jurisdiction, may by resolution or ordinance rescind said jurisdiction and thereby exclude itself from the provisions of Chapter 367, Florida Statutes, except from Section 367.171, Florida Statutes. The County has met that requirement. Therefore, staff recommends that the Commission acknowledge Resolution No. 2001-128, which rescinds Commission jurisdiction in Nassau County as of September 17, 2001.

The following utilities currently hold certificates of authorization from the Commission to provide water and/or wastewater service in Nassau County:

<u>UTILITY</u>	<u>CERTIFICATE NUMBER(S)</u>	
Florida Public Utilities, Inc. (Fernandina Beach System)	001-W	
Florida Water Services Corporation	171-W	122-S
United Water Florida Inc.	236-W	179-S

Pursuant to Section 367.171(5), Florida Statutes, when a utility becomes subject to regulation by a county, all cases in which the utility is a party then pending before the Commission shall remain within the jurisdiction of the Commission until disposed of in accordance with the law in effect on the day such case was filed. FPUC is a party to one docket pending before the Commission, Docket No. 990817-WS -- Application of Florida Water Services Corporation for amendment of Certificates Nos. 171-W and 122-S to add territory in Nassau County. Staff recommends that Certificate No. 001-W, held by FPUC, be canceled and returned to the Commission within 30 days from when FPUC is no longer a party to, or at the conclusion, of Docket No. 990817-WS. Staff notes that the cancellation of the certificate does not affect the authority of the Commission to collect, or the obligation of FPUC to pay, regulatory assessment fees (RAFs) accrued prior to the September 17, 2001, transfer of jurisdiction to the County. See Section 367.145(1)(a), Florida Statutes, and Rule 25-30.120(2), Florida Administrative Code.

Staff notes that Section 367.171(7), Florida Statutes, provides, in relevant part, that "the [C]ommission shall have exclusive jurisdiction over all utility systems whose service transverses county boundaries, whether the counties involved are jurisdictional or nonjurisdictional. . . ." UWF and Florida Water

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Services Corporation (FWSC), both of which provide service in Nassau County, also provide service in certain other counties in the area, including Duval County, which is contiguous to Nassau County. Therefore, jurisdiction over these two utilities is further addressed in Issues 2 and 3 of this recommendation, respectively.

**ISSUE 2:** Does the Commission retain exclusive jurisdiction over United Water Florida Inc.'s (UWF) facilities in Nassau County pursuant to Section 367.171(7), Florida Statutes?

**RECOMMENDATION:** Yes, pursuant to Section 367.171(7), Florida Statutes, because UWF operates as a single utility system transversing county boundaries, the County resolution does not rescind the Commission's exclusive jurisdiction over UWF's facilities in Nassau County, as well as in St. Johns and Duval Counties. (GERVASI, RIEGER)

**STAFF ANALYSIS:** UWF currently holds Certificates Nos. 236-W and 179-S from the Commission to provide water and wastewater service in Duval, St. Johns, and Nassau Counties. Duval County is contiguous to both Nassau and St. Johns Counties. St. Johns is a nonjurisdictional county.

Jurisdiction When Service Transverses County Boundaries

As noted in Issue 1, Section 367.171(7), Florida Statutes, provides, in relevant part, that "the [C]ommission shall have exclusive jurisdiction over all utility systems whose service transverses county boundaries, whether the counties involved are jurisdictional or nonjurisdictional. . . ."

By Order No. 24335, issued April 8, 1991, in Docket No. 910078-WS, the Commission found that UWF, then known as Jacksonville Suburban Utilities Corporation (Jacksonville Suburban or JSUC), was comprised of a "combination of functionally related facilities and land [which was] indeed a utility system whose service transverse[d] county boundaries and [was], therefore, subject to this Commission's exclusive jurisdiction." At that time, the question presented was whether the utility's services in St. Johns County were properly subject to regulation by the County, or whether exclusive jurisdiction resided within the Commission pursuant to Section 367.171(7), Florida Statutes. Among the uncontroverted facts considered in reaching its decision, the Commission noted that:

Jacksonville Suburban's facilities in Duval, Nassau, and St. Johns counties [were] managed from a single centrally located office. Officers and personnel responsible for management, engineering, accounting, maintenance, customer service representation, laboratory testing, and

administrative support [were] the same for the utility's operations in all three counties. Staffing, planning, and budgeting [were] done on a system-wide basis rather than county by county. Operating costs [did] not vary materially from county to county and rates [were] uniform throughout the utility's service area.

Order No. 24335 was affirmed on appeal in Board of County Commissioners of St. Johns County v. Beard, 601 So. 2d 590 (Fla. 1<sup>st</sup> DCA 1992) (Beard). In that case, the Court found that in determining whether Jacksonville Suburban was a system whose service transversed county boundaries within the meaning of Section 367.171(7), the Commission properly focused upon the statutory definition of "system" set out in Section 367.021(11), which states that "[s]ystem' means facilities and land used or useful in providing service and, upon a finding by the [C]ommission, may include a combination of functionally related facilities and land." Id. at 592-593.

In so finding, the Court rejected the County's assertion that the functional relationship referred to requires an actual physical connection between Jacksonville Suburban's facilities. "If physical interconnection was required there would be little need for a 'finding by the [C]ommission' that the facilities were functionally related." Id. at 593. The Court went on to agree with the Commission that "the undisputed evidence establishe[d] that these facilities [were] interrelated administratively and operationally." Id.

Further, by Order No. PSC-97-0929-FOF-WS, issued August 4, 1997, in Docket No. 970210-WS, the Commission granted UWF an amendment to its operating certificates to include additional territory in St. Johns County when UWF acquired the assets of Sunray Utilities. In so doing, the Commission found that the acquisition of the Sunray facilities would not change UWF's method of operation, and that once the facilities were acquired, they would be "functionally related to the other facilities owned by UWF in St. Johns, Nassau, and Duval Counties, and that they [would] thus become a portion of UWF's single utility system. . . ."

Staff notes that by Order No. PSC-97-0929-FOF-WS, the Commission determined that it had jurisdiction to process UWF's amendment application under both Beard and Hernando County v. FPSC,

685 So. 2d 48 (Fla. 1<sup>st</sup> DCA 1996) (Hernando County). Specifically, at pages 2 - 3 of the Order, the Commission noted that:

In Hernando County v. FPSC, the court reversed a Commission order determining that the Commission has jurisdiction over existing facilities and land of Southern States Utilities, Inc., in Florida. The court concluded that the relevant inquiry when determining the existence of jurisdiction under section 367.171(7) is the actual inter-relationship of two or more facilities providing utility services in a particular geographic area comparable to the service area defined in section 367.021(10), over which the PSC ordinarily has jurisdiction. Id. at 52. The court further concluded that the requirements of this statute can only be satisfied by evidence that the facilities forming the asserted system exist in contiguous counties across which the service travels. Id. Further, the court noted that to satisfy the prerequisites of section 367.171(7), the PSC must find that the systems were operationally integrated, or functionally related, in... utility service delivery [rather] than fiscal management. Id. at 51. . . . We note that the court found Beard to be both factually and legally distinguishable. Id.

(emphasis added; citation omitted.)

Staff notes that the court found Beard to be distinguishable in that all of the system-wide functions emanated from Duval County, and because the Beard case is concerned with the meaning of the word "system" rather than focusing on the meaning of "service." Id.

#### Nassau County Letter

By letter dated October 4, 2001, Nassau County informed UWF that because the County has determined that the services provided by UWF to County residents do not cross county boundaries, those services are regulated by the County as a result of the resolution at issue in this docket. The County cites to Beard and Hernando County in arriving at this conclusion. The County noted that the Hernando County court found that the Beard holding "does not reach the question and is not controlling with regard to the issue of the meaning of 'service' as used in section 367.171(7)." Hernando

County at 51. The County goes on to note that the Hernando County court treated the interpretation of the term "service" as used in the statute as an issue of first impression. The County concludes that the "service areas" which UWF is authorized to serve in Nassau and Duval Counties are not contiguous to one another, are not physically interconnected, and can easily be segregated from one another.

#### Staff Response

In response to this letter, by letter dated October 23, 2001, legal staff informed the County, as a courtesy, that the Division of Legal Services disagrees with the County's interpretation of the case law which led the County to reach its determination. In this letter, legal staff explained that the Hernando County decision reversed a Commission order determining that the Commission had exclusive jurisdiction over Southern States Utilities, Inc.'s (SSU, now Florida Water Services, Inc. or FWSC) facilities and land in the State of Florida pursuant to Section 367.171(7), Florida Statutes. The Court found that the Commission relied primarily upon centralized organization out of the utility's Apopka office, as well as regional management, to provide the basis for its decision that the various facilities constituted a single system providing service which transversed county boundaries. Id. at 50. The Court also found that rather than applying a distinct meaning to the word "service," the Commission concluded that the word "service" which must transverse county boundaries encompassed all of the same operational and administrative functions which were found to make SSU's facilities a "system." Id. at 50-51. The Court found that the Commission's definition of the word "service" was too expansive, and that "to satisfy the prerequisites of Section 367.171(7), Florida Statutes, the Commission must find that 'the systems were operationally integrated, or functionally related, in . . . utility service delivery [rather] than fiscal management.'" Id. at 51 (quoting Citrus County v. Southern States Utils., 656 So. 2d 1307 (Fla. 1<sup>st</sup> DCA), overruled on other grounds by Southern States Utils. v. FPSC, 714 So. 2d 1046 (Fla. 1<sup>st</sup> DCA 1998)).

Legal staff further explained that the Court went on to find that its previous decisions, including its decision in Beard, did not supply a valid basis for the Commission's expansive definition of the word "service" which it applied in determining its jurisdiction over SSU's facilities in the Hernando County case.



Hernando County at 51. In distinguishing Beard, however, the Court in no way invalidated the Beard decision, in which the Court found that Jacksonville Suburban's facilities indeed constitute "'a combination of functionally related facilities and land'; in a word, a 'system.'" Because the service provided by this system crosses county boundaries, it is clear that the PSC has exclusive jurisdiction over JSUC pursuant to subsection 367.171(7)." Beard at 593.

Legal staff advised the County that because the Beard decision is good law, it is our opinion that unless UWF's methods of operation have changed since the time of that decision such that the utility's facilities no longer operate as a single, functionally related system, the Commission maintains exclusive jurisdiction over UWF. We further advised that staff would endeavor to determine whether UWF's methods of operation have changed in such a way that would cause the Commission to lose jurisdiction over the utility's facilities in Nassau County as a result of the resolution.

#### UWF Letters

By letter dated October 22, 2001, UWF's Vice President of Regulatory Business, Mr. Walton F. Hill, advised legal staff that the facts cited in Order No. PSC-97-0929-FOF-WS (UWF amendment docket referenced at pages 5-6 of this recommendation), and as set forth in Docket No. 960451-WS (a UWF rate case that went to hearing, wherein the Commission accepted stipulations that UWF's land and facilities were functionally related and formed a single system), have not changed. According to the utility,

UWF still manages and operates all of its facilities from its office in Duval County, and its rates for utility service are uniform for all customers. Central office personnel provide the same utility services across the entire service area. UWF's customers are all serviced by the same customer service representatives at the same customer service telephone number. Financial, operating and capital planning is done centrally for all utility facilities. Thus, all of UWF's facilities and land in all Counties are functionally related.

Moreover, by letter dated October 23, 2001, counsel for UWF, Mr. William E. Sundstrom, advised staff that he supports the

proposition that the Commission retains jurisdiction over the UWF system located in Nassau County and that this matter was settled by the Beard decision. He also points out that in Order No. PSC-97-0929-FOF-WS, the Commission found that UWF was subject to Commission jurisdiction under both the Beard and Hernando County decisions because UWF's systems in Duval, St. Johns, and Nassau Counties were but "a single system whose service transverses all three county boundaries," making them a "single utility system" within the meaning of Section 367.021(11), Florida Statutes.

Counsel for UWF argues that this is a simple proposition of law and that unless the facts have changed, or the law has changed, lower courts and administrative agencies are bound by the precedential statements of higher courts. The legal principle is that trial courts and the administrative agencies may be at liberty to disagree with the binding precedent of the district courts of appeal having jurisdiction over them, and they are also at liberty to state the reasons for their disagreements in their orders or judgments for consideration by the higher courts, but they are nevertheless bound by such precedent and must follow it, unless the Florida Supreme Court says otherwise. (Citations omitted). Counsel further argues that the County may not, by ordinance, supersede a General Act of the Legislature, and that while it is true that pursuant to Section 367.171, the County may rescind Commission jurisdiction, it may not do so when Section 367.171(7) applies, as it does here.

#### Conclusion

Staff agrees with UWF that since UWF's methods of operation have not changed, the Beard decision is controlling law with respect to this matter. For all of the foregoing reasons, staff recommends that pursuant to Section 367.171(7), Florida Statutes, because UWF operates as a single utility system that transverses county boundaries, the County resolution does not rescind the Commission's exclusive jurisdiction over UWF's facilities in Nassau County, as well as in St. Johns and Duval Counties.

For informational purposes only, staff notes that currently, UWF has no matters pending before the Commission.

Staff further notes that, as stated in the case background, since the time that the resolution was executed, UWF was sold to JEA, a governmental authority exempt from Commission regulation

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pursuant to Section 367.022(2), Florida Statutes. It is staff's understanding that the sale was finalized on December 28, 2001. The utility is in the process of preparing a transfer application pursuant to Section 367.071(4)(a), Florida Statutes, which provides, among other things, that the sale of facilities to a governmental authority shall be approved as a matter of right. After the application is received and processed, staff will file a recommendation to address the sale and to cancel UWF's certificates.

**ISSUE 3:** Does the Commission retain exclusive jurisdiction over Florida Water Services Corporation's (FWSC) facilities in Nassau County pursuant to Section 367.171(7), Florida Statutes?

**RECOMMENDATION:** No, because FWSC does not operate as a single utility system transversing county boundaries, the Commission does not retain exclusive jurisdiction over its facilities in Nassau County pursuant to Section 367.171(7), Florida Statutes. Therefore, Certificates Nos. 171-W and 122-S, held by FWSC, should be canceled and returned to the Commission within 30 days of the conclusion of Docket No. 990817-WS. The cancellation of the certificates should not affect the authority of the Commission to collect, or the obligation of FWSC to pay, RAFs for the regulation of its Nassau County facilities accrued prior to the September 17, 2001, transfer of jurisdiction to Nassau County. (GERVASI, RIEGER)

**STAFF ANALYSIS:** By letter dated October 23, 2001, and referenced in Issue 2 of this recommendation, staff counsel advised the County that staff would endeavor to determine whether the County or the Commission has jurisdiction over FWSC's facilities in Nassau County. The purpose of staff's inquiry was to determine whether FWSC's facilities situated in Nassau County are functionally related to, or operationally integrated with, FWSC's facilities in a contiguous county such that the Commission would maintain jurisdiction over FWSC's facilities in Nassau County.

As noted in Issue 2, the Hernando County decision reversed a Commission order determining that the Commission had exclusive jurisdiction over SSU's (now FWSC) facilities and land in the State of Florida pursuant to Section 367.171(7), Florida Statutes. The Court found that "to satisfy the prerequisites of section 367.171(7), the PSC must find that the systems were operationally integrated, or functionally related, in . . . utility service delivery [rather] than fiscal management." Hernando County v. FPSC, 685 So. 2d at 51 (citation omitted). The court also concluded that "the requirements of this statute can only be satisfied by evidence that the facilities forming the asserted 'system' exist in contiguous counties across which the service travels." Id. at 52.

By letter dated December 7, 2001, and filed December 14, 2001, counsel for FWSC, Mr. Kenneth A. Hoffman, provided information concerning the cross-county operating functions that are shared by FWSC employees in connection with the provision of water and

wastewater services by the utility in Nassau and Duval Counties. According to FWSC, its employees situated outside of Nassau County provide the following services in Nassau County or have oversight responsibility for operational activities in Nassau County: meter reading; plant equipment maintenance; resolution of emergencies and/or outages; area supervisor based in Jacksonville; and regional manager based in Palm Coast.

Staff does not believe that the above-referenced functions support a finding that the Duval and Nassau systems are operationally integrated, or functionally related, in . . . utility service delivery [rather] than fiscal management. As noted in Issue 2, the Hernando County court found that the Commission relied primarily upon centralized organization, as well as regional management, to provide the basis for its decision that SSU's various facilities constituted a single system providing service which transversed county boundaries throughout the state. Id. at 50. Such activities were not enough to sustain the Commission's decision. The activities which FWSC identified in its December 7, 2001, letter to staff are similar to those identified by the Commission in Hernando County.

Moreover, the court distinguished Beard on the basis that the Beard court was concerned with the meaning of the word "system" rather than focusing on the meaning of "service." The Court found that rather than applying a distinct meaning to the word "service," the Commission concluded that the word "service" which must transverse county boundaries encompassed all of the same operational and administrative functions which were found to make SSU's facilities a "system." Id. at 50-51. The Court found that the Commission's definition of the word "service" was too expansive. Id. at 50. The Court found that

In reaching the conclusion that SSU's facilities form a system whose service transverses county boundaries, the PSC ruled that "service" encompasses everything necessary to provide water to and collect and treat wastewater from SSU's customers, including the administrative and operational functions which make it possible for the utility to provide the water and wastewater service, such as billing, meter reading, and environmental permitting.

Id.

Further, as noted in Issue 2, the Hernando County court found Beard to be distinguishable in that all of Jacksonville Suburban's system-wide functions emanated from Duval County. Unlike UWF, not all of FWSC's functions in Nassau County emanate from Duval County. Nor does FWSC state in its December 7, 2001, letter that its Duval and Nassau County facilities function as a single system transversing county boundaries.

Finally, as noted by the Hernando County court, "[a]ny reasonable doubt as to the lawful existence of a particular power that is being exercised by the Commission must be resolved against the exercise thereof, and the further exercise of the power should be arrested." Id. at 51 (quoting City of Cape Coral v. GAS Utilities, Inc., 281 So. 2d 493, 496 (Fla. 1973)).

Based on the foregoing, it appears that FWSC does not operate as a single utility system transversing county boundaries between Nassau and Duval Counties or between Nassau and any other contiguous county. Therefore, staff recommends that the Commission does not retain exclusive jurisdiction over FWSC's facilities in Nassau County pursuant to Section 367.171(7), Florida Statutes.

As noted in Issue 1, pursuant to Section 367.171(5), Florida Statutes, when a utility becomes subject to regulation by a county, all cases in which the utility is a party then pending before the Commission shall remain within the jurisdiction of the Commission until disposed of in accordance with the law in effect on the day such case was filed. FWSC has one docket pending before the Commission respective to its Nassau County facilities, which is Docket No. 990817-WS -- Application of Florida Water Services Corporation for amendment of Certificates Nos. 171-W and 122-S to add territory in Nassau County. Staff recommends that Certificates Nos. 171-W and 122-S, held by FWSC, be canceled and returned to the Commission within 30 days of the conclusion of Docket No. 990817-WS. The cancellation of the certificates does not affect the authority of the Commission to collect, or the obligation of FWSC to pay, RAFs for the regulation of its Nassau County facilities accrued prior to the September 17, 2001, transfer of jurisdiction to Nassau County.

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**ISSUE 4:** Should this docket be closed?

**RECOMMENDATION:** No. If no protest is received from a substantially affected person to the proposed agency action issues, a consummating order should be issued and this docket should remain open until Docket No. 990817-WS has been closed, after which time this docket should be closed administratively and FPUC'S Certificate No. 001-W, and FWSC's Certificates Nos. 171-W and 122-S should be cancelled. (CROSBY)

**STAFF ANALYSIS:** If no protest is received from a substantially affected person to the proposed agency action issues, a consummating order should be issued and this docket should remain open until Docket No. 990817-WS has been closed, after which time this docket should be closed administratively and FPUC'S Certificate No. 001-W, and FWSC's Certificates Nos. 171-W and 122-S should be cancelled.